

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 1.17 of the)	GC Docket No. 02-37
Commission's Rules Concerning Truthful)	
Statements to the Commission)	
)	
)	

COMMENTS OF VERIZON¹ ON NOTICE OF PROPOSED RULEMAKING

As the Commission recognizes, “the vast majority of persons dealing with the Commission understand their obligation to take the appropriate steps to ensure that the information they submit is accurate.”² Changing the truthful statements rule to allow for enforcement action against those who inadvertently make material misstatements or omissions of fact therefore is not likely to provide many benefits, and raises serious First Amendment and Due Process concerns. The Commission should not undertake the rule change suggested, because the wording of the proposed rule is overbroad and will discourage voluntary disclosures to the Commission. Instead, the rule should be amended to punish only those who make willful or repeated violations.

I. The Proposed Rule Raises Serious Constitutional Concerns

The Commission has proposed amending 47 C.F.R. § 1.17, relating to truthful statements to the Commission, to add the following language:

(b) No person shall, in any written or oral statement of fact submitted to the Commission, intentionally or negligently provide incorrect material

¹ The Verizon telephone companies (“Verizon”) are the local exchange carriers affiliated with Verizon Communications Inc., and are listed in Attachment A.

² Notice of Proposed Rule Making, *In the Matter of Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, GC Docket No. 02-37 (rel. Feb. 22, 2002) (“NPRM”).

information or intentionally or negligently omit any material information bearing on any matter within the jurisdiction of the Commission.

NPRM, ¶ 4. It appears that the Commission is proposing expanding the scope of the rule from the current rule (which applies to “statements and responses to Commission inquiries and correspondence”) to “*any* written or oral statements of fact submitted to the Commission.” NPRM, ¶¶ 2, 4 (emphasis added). The Commission has opined that the rule change is needed, because the current rule is unduly narrow, and “may hamper our ability to take enforcement action in those rare cases where persons dealing with the Commission do not exercise the requisite care to ensure that they submit accurate information.” *Id.*, ¶ 3.

The proposed changes to Rule 1.17 raise serious First Amendment and Due Process issues. The Supreme Court has recognized that both the Free Speech Clause and the Petition Clause protect the right of private parties to create and submit advocacy materials to administrative agencies, such as the FCC. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 612 (1972) (“Certainly the right to petition extends to all departments of the Government”). Because the proposed changes to Section 1.17 render the regulation both substantially overbroad and vague, they threaten to chill the exercise of these rights in the preparation and submission of pleadings and other materials to the Commission. They also threaten the traditional role of attorneys as advocates for their clients and the adversarial process on which the Commission relies for effective presentation of the law and facts in many of its contested dockets.

First, the proposed amendment renders the rule substantially overbroad. While the agency may have the constitutional authority to punish factually inaccurate speech, the rule sweeps within its ambit true speech that the agency later judges to be somehow

incomplete. The proposed rule prohibits any person, in “*any* written or oral statement of fact submitted to the Commission,” from “intentionally or negligently omit[ting] *any material information bearing on any matter within the jurisdiction* of the Commission.” (Emphasis added). Often in FCC practice, the question of whether certain facts are “material” or “bear on” a regulatory issue in a particular docket will itself be a contested issue. The terms “material” and “bearing on” have no fixed or customary meaning in this context and thus there is no “core of easily identifiable and constitutionally proscribable conduct” that serves to narrow the rule. *See Maryland v. Joseph H. Munson*, 467 U.S. 947, 965-6 (1984). Because the proposed rule “does not aim specifically at evils within the allowable area of government control[,]” but sweeps in truthful speech that the Commission later judges in its discretion to have been somehow “incomplete” the proposed addition to Section 1.17 is void for overbreadth. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Second, the proposed amendment to Rule 1.17 is also void for vagueness. A regulation is unconstitutionally vague, and thus violates due process, when it fails to give a person of ordinary intelligence fair notice that his contemplated activity is prohibited. *See, e.g., Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Here, it is impossible for those who provide the Commission with information both formally and informally to ascertain what will be deemed “material” or what will be considered to “bear on” the Commission’s decisional process in a particular docket. Such vagueness is especially troubling where, as here, a regulation “abut[s] upon sensitive areas of basic First Amendment freedoms,” because “it operates to inhibit the exercise of [those] freedoms.” *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (internal

quotations and citation omitted). Indeed, “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Id.* Thus, the proposed rule – by failing to demarcate clearly the bounds of unlawful behavior – would not only provide inadequate notice of the proscribed conduct, but would also discourage individuals from exercising their constitutionally protected right to petition the government.

Third, the proposed rule would unconstitutionally “prohibit[] speech and expression” upon which the Commission “must depend for the proper exercise” of its adjudicatory and regulatory powers. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001). The proposed additions to the rule could substantially intrude into the role of attorney as advocate by turning pleadings into laundry lists of pro and con facts, rather than pieces of advocacy. In *Velazquez*, the Supreme Court made clear that wholesale restrictions on attorneys “in presenting arguments and analyses to the courts distort[] the legal system by altering the traditional role of . . . attorneys[.]” *Id.* at 544. While not a flat-out prohibition on any arguments, the proposed addition to Rule 1.17 easily could distort the role of the attorney practicing before the FCC in a manner “inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution,” *see id.* at 545, if it were read to require the attorney to include every fact that could potentially militate against his client’s position or forego filing altogether. As the Supreme Court recognized in *Velazquez*, such an unfortunate state of affairs would not only denigrate the individual rights guaranteed by the Constitution, but would also impair the proper functions of the adjudicatory body at issue. *See id.* at 546, 548 (concluding that the “restriction imposed

by the statute here threatens severe impairment of the judicial function” as well as impermissibly “confin[ing] litigants and their attorneys”). In sum, the proposed addition renders Section 1.17 substantially overbroad, void for vagueness and could impermissibly impinge on the role of attorneys practicing before the Commission as advocates for their clients.

II. The Proposed New Rule Constitutes Bad Policy Because it Is Overbroad, and Will Discourage Voluntary Disclosures to the Commission

In addition to the legal problems discussed above, there are serious policy problems with the broad rule change proposed. By focusing on the opportunity for “enforcement action,” and drafting the rule as broadly as the Commission proposes, the Commission has unwittingly created a disincentive for persons to voluntarily offer information to the Commission.

By fashioning a rule that subjects persons to enforcement action for “negligently provid[ing]” incorrect information or “negligently omit[ting] *any* material information bearing on *any* matter within the jurisdiction of the Commission,” the Commission sets a standard that may strike fear in the hearts of those who are contemplating making submissions to the Commission. The proposed rule does not define what would be considered “material” to “any matter within the jurisdiction of the Commission,” and the requirement as written is so broad as to make the standard impossibly vague. Not knowing what the Commission may, in hindsight, judge to be “any” “material” information bearing on “*any* matter within the jurisdiction of the Commission,” providers of information might choose the kitchen sink approach (giving the Commission more than it wants, in order to ensure that the statement is not deemed incomplete), or, if the providing of information is voluntary, to make no statements to the Commission at all.

Because the proposed new rule will apply to *any* statements, it likely would cut down on the amount of informal dialogue persons will be willing to have with the Commission, and its effects on formal advocacy presentations are unknown. The Commission receives information in several different types of forums, including panel discussions, speeches, rulemaking proceedings, complaints, and informal discussions during *ex parte* meetings at the Commission. In many of these less formal situations, commenters may be addressing only a few discrete issues, or responding to Commission requests to present “off-the-cuff” estimates or “ballpark” numbers. Responders should not be made to worry that they must undertake a comprehensive review in order to make sure not to omit from their statements anything else “bearing on any matter within the jurisdiction of the Commission” that the Commission may deem to be “material.” Under the new rule, as written, persons may be hesitant to comply with these informal requests for fear of risking enforcement action if their statements are incorrect or if they omit anything “material” to “any matter within the jurisdiction of the Commission.”

And advocates in more formal proceedings (such as complaint actions and rulemaking proceedings) may be hampered from filing advocacy pieces, for fear of being criticized for failing to point out facts in support of those who oppose their stance. Moreover, if accepted, the broadened version of Rule 1.17 could open the floodgates to complaint action by opponents of the information provider, who may argue that there was a violation of the rule if the commenter “omitted” statements material to the opponent’s point of view.³

³ There already exist separate rules regarding the truthfulness of matters contained in formal complaints. *See, e.g.*, 47 C.F.R. §§ 1.720(g), 1.721.

The Commission's rules regarding truthful statements should strike a balance that protects and encourages the free flow of information. As drafted, the proposed rule does not.

III. The Commission Should Redraft the Rule To Punish Only Willful or Repeated Violations

The Commission's goal should not be to penalize violators, especially in a way that implicates Constitutional concerns, but to encourage truthful submissions and the free flow of speech. One way to encourage a free flow of information is to draft the proposed rule so that only those who make "willful" material misstatements or omissions, or who "repeatedly" make material misstatements or omissions, are subject to enforcement action. The Commission should not craft a rule that punishes merely negligent statements. A punitive negligence standard is unnecessary because, even absent regulatory requirements, those who deal with the Commission on a repeated basis want to ensure that they are careful with the statements that they make, in order to maintain credibility with the Commission. And, as stated above, lowering the standard for punishment will have the unintended effect of discouraging voluntary disclosures.

The rule also should clarify that there only exists a material "omission" if the omitted fact is relevant to the facts being presented to the Commission. Otherwise, as currently drafted, the scope of the rule (requiring providers of information not to omit "*any* material information bearing on *any* matter within the jurisdiction of the Commission") is so overbroad as to be nonsensical.

Rather than rewriting the section on truthful statements entirely, the Commission could add the following to the end of the text of Section 1.17, which makes it explicit that

willful or repeated material misstatements or omissions will subject one to enforcement action:

Any person who willfully or repeatedly makes material misstatements of fact, or omits statements of fact material to the issues of fact being presented, may be subject to enforcement action.

Conclusion

The Commission should not adopt the language of the proposed Section 1.17(b), which raises serious Constitutional concerns, but should instead craft a section that is more likely to encourage the free flow of information and punish only those who make willful or repeated violations.

Respectfully submitted,

A handwritten signature in cursive script, reading "A Rakestraw".

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THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.